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LABOR AND EMPLOYMENT NOTES
APRIL 2006

5TH CIRCUIT RECOGNIZES THAT AN EMPLOYER'S PLACEMENT OF AN EMPLOYEE ON LEAVE CAN RESULT IN "INVOLUNTARY" FMLA LEAVE IF...

It is common for an employer to require an employee to provide a medical release or to submit to a medical examination before returning to work after a sickness or medical leave. Some employees contend the time it takes to complete this process amounts to involuntary FMLA leave and they should receive all benefits of the Act related to such leave. In a recent Fifth Circuit decision, the court recognized that an employer can place an employee on "involuntary" FMLA leave if the employee has provided the employer with notice of the employee's "serious health condition," and the involuntary nature of the leave does not deprive the employee of rights under the Act. *Willis v. Coca Cola Enterprises, Inc.*, 2006 WL 827359 (5th Cir. March 31, 2006).

The facts in *Willis* are interesting. Willis was a Senior Account Manager with Coca Cola Enterprises. On a Monday, in May 2003, she called her supervisor and told him she would not be at work that day because she was sick. In the same conversation, she told her supervisor she was pregnant, but she did not specifically tell her supervisor she was sick because of her pregnancy. On Tuesday, she called her supervisor to ask where to report to work, and he told her the company could not allow her to come back to work until she had a doctor's release. Willis told the supervisor that she had a doctor's appointment on Wednesday. Naturally, the supervisor thought Willis meant she had an appointment the next day, a Wednesday, but as it turned out, Willis did not have a doctor's appointment until the next Wednesday. She did not call in or come to work until the next Thursday, when she learned she had been terminated for violation of the company's "No Call/No Show" policy.

Willis brought suit for interference with FMLA rights and sex discrimination. Willis argued that although she did not request FMLA, her employer placed her on involuntary FMLA and then interfered with her rights under the Act by firing her. The court disagreed. The court found the employee did not provide enough information to the employer about her condition for her leave to qualify as FMLA leave: Willis did not tell her supervisor she was sick due to her pregnancy, but only complained she was "sick." "A complaint of sickness will not suffice as notice of a need to take FMLA leave." The FMLA was never triggered and Coca Cola did not interfere with Willis' FMLA rights.

Although the facts in *Willis* did not trigger the FMLA, the court nonetheless recognized the FMLA can be triggered if the employer places the employee on leave and is on notice of an employee's "serious health condition." The court specifically stated:

> "We therefore must consider a novel question for this circuit: what constitutes involuntary FMLA leave and what are the parties' rights and obligations pursuant to this type of leave. As a threshold matter, it is not contrary to the FMLA for an employee to be placed on "involuntary FMLA leave."
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> We believe the statutory language of the FMLA and the relevant caselaw from our sister circuits require, even in the case of involuntary leave, that the employee provide sufficient notice to an employer of the need to take FMLA leave; in other words, that the employee provide notice to the employer of a "serious health condition."

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IS IT "JURISDICTIONAL"?

In a recent Supreme Court decision, the Court held that Title VII's requirement that a covered "employer" meet a minimum threshold number of employees is not "jurisdictional" but is part of the requisite elements of a claim for relief. *Arbaugh v. Y & H Corp.*, 126 S. Ct. 1235, 163 L.Ed.2d 1097, 74 USLW 4138 (2006). The effect of holding that the threshold is not "jurisdictional" was to abrogate previous Fifth Circuit jurisprudence treating Title VII's employee-numerosity requirements as a matter of federal court subject-matter jurisdiction that is not subject to waiver or estoppel.

In a post-*Arbaugh* decision, the import of the jurisdictional/non-jurisdictional distinction is again illustrated. In *Minard v. ITC Deltacom Comm.*, 04-30230 (5th Cir. Apr. 18, 2006), the Fifth Circuit held that the FMLA's employee- numerosity requirement for "eligible employee " is not an element of subject matter jurisdiction, but is an element of the claim for relief under the FMLA that may be subject to waiver or equitable estoppel. Under the FMLA, an "eligible employee" does not include those who are employed at a worksite having less than 50 employees where the total number or employees within 75 miles of the worksite is less than 50. In *Minard*, the plaintiff requested and was granted FMLA leave for surgery, but when she was scheduled to return to work, she was terminated. The employer contended that there was no FMLA violation because it discovered while the employee was on leave that the plaintiff was not an "eligible employee" under the FMLA due to the worksite employee-numerosity threshold. Because the "eligible employee" threshold was not jurisdictional, the plaintiff was able to urge that her employer was bound by its initial representations to her that she was eligible for FMLA. Finding that the plaintiff could present such an argument, the Fifth Circuit did not rule on whether the elements of equitable estoppel were met, finding a material issue of fact and remanding for further proceedings.

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